No. 83-631

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

SPACEFONE CORPORATION,

Petitioner

-vs-

WILLIAM J. JOHNSTON,

Respondent

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Respondent submits that Petitioner's statement of questions presented is deficient and that the following questions are more aptly before the Court.

1. Whether the intention of a company to engage in Interstate Commerce once it begins to do business affects employees during the development stages under Fair Labor Standards Act.

2. Whether physical work on the final product is a requirement to prove as a matter of law that an employee be engaged in (1) "production" of (2) "goods" (3) "for commerce" so as to bring him under the protection of the Fair Labor Standards Act.

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STATEMENT OF THE CASE

Facts

In addition to the facts stated in Petitioner's Brief, Respondent calls attention to the following.

Spacefone produced at least one and, inferentially, perhaps several prototypes of a cordless telephone the company was organzed to develop, manufacture, produce and sell in interstate commerce. At least one, perhaps several, of these prototypes was taken by company officials from its point of manufacture

and production in the State of Georgia and carried to prospective investors in the project, the said prospective investors being located in Connecticut, New York, Pennsylvania and Florida.

The employee/respondent involved in the lawsuit manually formed from pieces of plastic, using a vacuum form machine, the housing for the devices, and he assembled the numerous component parts into the completed prototypes.

The employee also engaged in ordering parts from various in-state and out-of-state sources for the units produced. He received delivery of the parts from the suppliers. Delivery was effectuated through such facilities as the postal service, United Parcel Service and the telephone company, all instrumentalities of interstate commerce.

The employee's work was devoted to the improvement of an instrumentality of interstate commerce, viz., the telephone.

REASONS FOR DENYING THE WRIT

Statement of Position

The questions presented in petitioner's brief are almost identical with those stated in its Petition for Rehearing and En Banc Consideration in the Eleventh Circuit Court of Appeals. That Court found them without merit and approved the decision of the three judge panel which heard the appeal.

Since an employee is entitled to the benefits of the Fair Labor Standards Act if he engages in the production of goods for commerce or engages in commerce itself, the employee in this case enjoys a duality of coverage

since he not only produced prototypes which moved in commerce, but he used the instrumentalities of commerce in the regular course of his work. Indeed, the very purpose of the work was the improvement of an instrumentality of commerce.

While it appears that no phone was sold by the company, the claim by petitioner that

> "No phones were ever made or sold by Spacefone. Spacefone never got into business and thus never entered commerce" (pg. 7 of petitioner's brief)

is at best ambivalent and is contradictory of other statements included in the brief. Petitioner acknowledges (on pg. 4 of its brief) that it was in the business of attempting to develop its product. Petitioner acknowledges (on pg. 5 of its brief) that one unperfected prototype was taken out

of the state. While there may have been no sales made by Spacefone, nowhere in the Act is there any provision that indicates a "sale" is a necessary prerequisite to establish traditional coverage for an employee. There is no case law which indicates any such prerequisite.

Counsel for the employee/respondent takes the position that a company which is organized to develop a new product which it fully intends to produce and sell in interstate commerce comes under the purview of the Fair Labor Standards Act AB INITIO. Its employees are not required to work in a limbo until the products of the company are first sold to out-of-state purchasers. Any other interpretation invites chaos in the workplace, chaos in the courts. No employee should be required to gamble on the chance that the work he performs

might not be entitled to any compensation whatsoever. No court should have the burden of determining the retroactive effect of the Fair Labor Standards Act on work already performed once out-of-state sales and shipments make it clear that the activities precedent to the sales were, for sure, covered and subject to the minimum wage and overtime benefits provided by the Act.

Statutory Law

The Fair Labor Standards Act, 29 U.S.C. Sec. 206 (a) provides "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages at the following rates."

So we have "produced", "goods", and "commerce" as the prerequisites.

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." 29 U.S.C. Sec. 203 (j)

With this very sweeping definition, given the circumstances of a company assemblying prototypes of a cordless telephone it is in the process of perfecting, the employees who engaged in such work certainly "produced", within the meaning of the definition.

"'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 29 U.S.C. Sec. 203 (i)

Again, Congress has furnished a broad definition of this word. A formed plastic casing used to contain an assembly of a multitude of component parts meets the definition, whether there is one unit or several such units produced. Even one unit has numerous parts and ingredients and constitutes "goods". To say the unit is a "good" (singular) is but a quibble.

"'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. Sec. 203 (b)

Petitioner seeks to de-emphasize the fact that the "goods" "produced" were transported in "commerce", although admitting that the prototypes were carried to several other states from their state of manufacture, Georgia. This transportation clearly put them in "commerce".

CASE LAW

The decision of the Eleventh Circuit Court of Apeals is based firmly on the bedrock cases which form the very foundation of the Wage-Hour Law. Counsel for employee can offer no better autho-

rities and relies on the cases cited by the Circuit Court.

Petitioner cites many of the same cases but draws from them conclusions not intended to be drawn by the Supreme Court. In U.S. v. Darby, 312 U.S. 100 (1940), the Supreme Court was correcting the decision of a lower Court which had held that mere "intent" at the time of production to later sell goods in interstate commerce was not sufficient to cause coverage. The Supreme Court made it clear that intent to produce goods for sale in commerce resulted in coverage, and this applies to all businesses, at whatever stage of development. And this was the express intent of Spacefone according to the testimony of its chief operating officer.

The Eleventh Circuit Court of Appeals directly considered Kirschbaum v. Walling, 316 U.S. 517 (1942) and 10 E. 40th Street Building, Inc. v. Callus, 325 U.S. 578 in reaching its decision in the lower court and found that the employees' activities were not of the kind to be excluded as "local" activities.

Keeping in mind that it is well established law that the phrase "engaged in commerce" is to be given a broad and liberal construction rather than a strained and technical one in order to effectuate the purposes of the Act, (Mitchell v. C. W. Vallman & Co., Inc., 349 U.S. 427 (1955); Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 243 (1959), employee's counsel calls upon

this Honorable Court to deny the Petition for Writ of Certiorari and let the decision of the Eleventh Circuit Court of Appeals stand.

Respectfully Submitted,
WORD, COOK AND WORD
ATTORNEYS FOR APPELLANT

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CERTIFICATE OF SERVICE

I, Reuben M. Word, hereby certify that I have served a copy of the within and foregoing Respondent's Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on opposing counsel, to-wit:

Mr. Robert S. Jones
Attorney at Law
Suite 200, Peachtree & Broad Building
Atlanta, Georgia 30043

by depositing a copy of same in the United States Mail at Carrollton, Georgia, with sufficient postage thereon.

This 12TH day of JANUARY, 1984.

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